

Supreme Court of Kentucky

ORDER

IN RE: ORDER APPROVING THE LOCAL RULES OF PRACTICE AND PROCEDURE FOR THE 34TH JUDICIAL CIRCUIT COURT, McCREARY AND WHITLEY COUNTIES

Upon recommendation of the Judges of the 34th Judicial Circuit, and being otherwise sufficiently advised,

The Local Rules of Practice and Procedure for the 34th Judicial Circuit, McCreary and Whitley Counties, are hereby approved. This order shall be effective as of the date of this Order, and shall remain in effect until further orders of this Court.

Entered this the 4th day of August 2017.


CHIEF JUSTICE JOHN D. MINTON, JR.

**RULES OF PRACTICE AND PROCEDURE
OF THE 34TH JUDICIAL CIRCUIT
WHITLEY AND MCCREARY COUNTIES**

**THE HONORABLE DAN BALLOU
DIVISION I**

AND

**THE HONORABLE PAUL WINCHESTER
DIVISION II**

PRESIDING

2017

**RULES OF PRACTICE AND PROCEDURE
OF THE WHITLEY AND MCCREARY CIRCUIT COURTS
34TH JUDICIAL CIRCUIT**

RULE 1. INTRODUCTION / ADMINISTRATIVE PROCEDURE

101. INTRODUCTION / PREFACE.

All practice and procedure before the Circuit Judge or the Domestic Relations Commissioner shall be subject to these local rules, the Kentucky Civil Rules of Procedure (CR), the Family Court Rules of Procedure and Practice (FCRPP), the Kentucky Criminal Rules of Procedure (RCr) and all other laws and statutes of the Commonwealth of Kentucky enacted by the General Assembly, and Rules enacted by this Court and the Court of Appeals and the Supreme Court of Kentucky.

102. EFFECTIVE DATE.

These rules are adopted pursuant to the authority granted by Rule 1.040(3) of the Rules of the Supreme Court. They shall be effective with full force and effect to all actions filed or pending after their promulgation by order of the Chief Judge of the Whitley and McCreary Circuit Courts and certification and approval of the Chief Justice of the Supreme Court of Kentucky.

103. CITATION OF RULES

These rules apply to the practice of law in the 34th Judicial Circuit, which consists of Whitley and McCreary Counties, and may be cited as “Rules of the 34th Judicial Circuit” or “R34JC.”

104. ASSIGNMENT OF CIVIL CASES

104.1 When a civil action is filed, the Clerk shall enter the appropriate information into the computer system and request the computer to assign the case to a Division. Thereafter, all process, pleadings, motions, orders, and papers filed in the case shall set forth the Division on which the case has been assigned. Before assigning the case to a particular Division, the Clerk of the court shall assign a file number to the action.

104.2 For the purpose of assignment, civil cases include contract, domestic relations, personal injury, products liability, property, District Court Appeals, administrative and state board appeals, cases transferred from circuits outside of the 34th Judicial Circuit, and other cases.

105. ORGANIZATION OF THE WHITLEY AND MCCREARY CIRCUIT COURTS

105.1 The Whitley and McCreary Circuit Courts shall be composed of a Civil Branch and a Criminal Branch. The Criminal Branch shall have exclusive jurisdiction of all criminal cases, and the Civil Branch shall have jurisdiction of all other cases within the jurisdiction of the Circuit Court.

105.2 The Whitley and McCreary Circuit Courts are courts of continuous session, and consist of Division I and Division II.

105.3 The Judge of each Division shall hear cases in both the Civil Branch and the Criminal Branch of the Court.

105.4 Each Judge of a Division may preside and hear and determine any case or question in the other Division when the Judge of that Division is sick, absent from the county, or is not available.

105.5 After each case has been assigned to a Division, the Judge thereof may, for any reason, transfer it to the other Division. An order of transfer will be entered and, upon such transfer being made, the Clerk will make a proper endorsement upon the Docket and the record.

105.6 When two or more cases have been filed that may, as a matter of right or in the discretion of the Court, be consolidated and such actions are pending in different divisions of the Court, any party to any of the actions, or the Court without motion, may have any of the actions transferred to that Division of the Court in which the first of the cases was filed. If it is determined that consolidation is not proper, the Judge of that division may transfer the case back to the original division.

RULE 2. COURT SCHEDULING / MOTION HOUR / PROCEDURES FOR FILING – CIVIL CASES

201. REGULAR MOTION HOUR SCHEDULE - CIVIL.

201.1 **CIVIL MOTION DAYS;**

DIVISION I:

WHITLEY – 9:00 A.M. – FIRST (1ST) MONDAY OF EACH MONTH

McCREARY – 9:00 A.M. – FOURTH (4TH) MONDAY OF EACH MONTH

DIVISION II:

WHITLEY – 9:00 A.M. – THIRD (3RD) MONDAY OF MONTH

McCREARY – 9:00 A.M. – SECOND (2ND) MONDAY OF EACH MONTH

In the event a motion day falls on an observed holiday, it shall be held on Tuesday immediately following the scheduled Monday motion day.

201.2 DOMESTIC MOTION DAYS:

DIVISION I:

WHITLEY – 9:00 A.M. – TO BE HELD ON THE THURSDAY IMMEDIATELY FOLLOWING THE REGULAR DIVISION I MOTION DAY

DIVISION II:

WHITLEY – 9:00 A.M. – TO BE HELD ON THE THURSDAY IMMEDIATELY FOLLOWING THE REGULAR DIVISION II MOTION DAY

202. CIVIL PRETRIAL CONFERENCES AND TRIALS (INCLUDES ALL GENERAL CIVIL CASES)

202.1 A party desiring assignment of a civil jury trial date shall file a motion for a pre-trial conference/trial. Civil Trials shall be assigned for a date certain during a civil session month. For Whitley County the civil session months are February, April, June, August, October and December. For McCreary County the civil session months are January, March, May, July, September, and November.

202.2 A pretrial conference shall be held as a matter of course in all jury actions, upon the motion of either party, in the Court's discretion, or upon the Court's own motion in any other action.

202.3 The attorney attending the pretrial conference shall be familiar with the case and shall be prepared and authorized to make such arguments, stipulations, and decisions as may be required.

202.4 Except for good cause shown, before a case is heard at the pre-trial conference, the parties shall:

A. Insure that the pleadings are completed and the issues identified.

B. Have scheduled or completed discovery, including the exchange of medical reports and medical bills, or evidence of special damages as are subject to discovery in personal injury actions.

C. Be prepared to stipulate the admissibility of documents or other evidence and to withdraw allegations or defenses if same can be done without prejudice to the presentation of the case.

202.5 A pretrial order will be entered by the Court setting out the Court's rulings and agreements and/or stipulations of the parties. The Court shall require the parties to submit a trial brief consisting of a short memorandum of the facts and law on which they will rely.

203. MOTIONS IN CIVIL CASES

203.1 FORM OF MOTION

A. Written motions, other than those that may be heard ex parte, and notice of the hearing thereof, shall be filed with the Clerk at least five days before the time specified for the hearing unless a different period is fixed by the Rules of Civil Procedure, any applicable statute, or by Court order.

B. Unless otherwise noticed therein, each motion shall be assigned for hearing on the first Motion Day at which it can be lawfully heard under the rules of Civil Procedure, these Rules, or any applicable statute. The notice shall specify the date, time, and place for the hearing.

C. All motions going to the merits of the case, including motions to dismiss, motions for summary judgment, motions to strike, and motions under CR 12.02, shall be filed at least 10 days prior to motion hour and accompanied by a brief memorandum of the grounds for the motion with citation of authorities relied upon, but not greater than 25 pages in length. Failure to file a memorandum of grounds with supporting authorities may be grounds for overruling the motion. Any party properly served with a motion accompanied by a memorandum of grounds and authorities shall file a response containing a memorandum of grounds opposing the motion, with citation of supporting authorities, but not greater than 25 pages in length. Such response shall be filed at least 72 hours prior to the time specified in the notice of hearing of the motion. Failure to file a timely response may be grounds for sustaining the motion, but the time for filing a response may be extended upon oral or written motion for good cause shown, including such factors as the length and complexity of the motion and supporting memorandum. Any reply memorandum shall be limited to 5 pages in length and must be filed 24 hours before the hearing.

D. Non-jury cases will be assigned for trial only upon motion at the call of the Motion Docket, at which time the Court shall be informed of the probable duration of the trial and any conflicting trial obligations of counsel for the parties.

E. A motion to compel discovery, for a protective order, or for sanctions, may be filed pursuant to CR 26 and/or CR 37 only if counsel are unable to resolve between themselves the discovery dispute. Counsel has the duty to make a good faith effort to resolve any disputes which arise in the course of discovery. The moving party shall attach to the motion a certification of counsel that counsel has conferred and that they have been unable to resolve their differences. The certification should detail the attempts of counsel to resolve the dispute.

203.2 DOCKETING AND APPEARANCES

A. The Clerk shall keep a Motion Docket on which will be docketed all motions assigned for hearing on each Motion Day, either by Court order or by notice duly served. The Clerk

will keep separate dockets for each Division.

B. Every motion, other than ones which may be heard ex parte, shall appear on the Motion Docket.

C. The Motion Docket will be called on Motion Day and, unless otherwise ordered, the motions will be heard in the order docketed. When at Motion Day, the case is called, participating counsel shall stand in place, answer the call, and advise the Court if a hearing is necessary in the matter. If a hearing is necessary, the case shall be assigned for a date and time certain.

204. PROPOSED ORDERS SHALL BE FILED AND SUBMITTED WITH A MOTION.

205. AGREED ORDERS

205.1 If an agreed order, signed by counsel for all parties affected, relating to a motion appearing on the Motion Docket is submitted to the Clerk prior to the call of the Motion Docket, counsel need not attend the call of the Motion Docket. The agreed order shall set forth the basis for the order.

205.2 Out-of-Court resolutions of discovery disputes may be effectuated by submitting to the Court an agreed order signed by counsel for all affected parties. No supporting motion is necessary and the matter need not be placed on the Motion Docket.

206. ENTRY OF ORDERS AND JUDGMENTS

206.1 When a ruling is made or opinion rendered, a proposed order or judgment in conformity therewith shall be presented to the Court with a copy simultaneously remitted to opposing counsel. If a party is not represented by counsel, then the copy shall simultaneously be remitted to said party's address of record.

206.2 When signed by the Judge, the order or judgment shall be delivered to the Clerk for entry. Counsel preparing the order or judgment shall also deliver to the Clerk a sufficient number of copies together with properly addressed stamped envelopes to permit the Clerk to complete service thereof when required by CR 77.04. Counsel may waive service of any order or judgment, and notice of entry.

206.3 Proposed orders shall be filed and submitted with a motion.

206.4 In no event shall a tendered or proposed order or judgment contain the letterhead of a law firm on the judgment or order.

207. DEFAULT JUDGMENTS

207.1 A party seeking a judgment by default under CR 55.01 shall file a written motion. The motion should certify that the opposing party has been served with process and has served no

papers upon the moving attorney. The motion should also state whether the opposing party is in the military service.

207.2 The motion shall be noticed for hearing and placed on the regular motion day docket. The party seeking the default judgment shall appear on the motion day that the motion is noticed to be heard.

208. MOTIONS, PLEADINGS, AND BRIEFS

208.1 All motions, pleadings, and orders shall be typewritten or electronically printed, on 16 pound or heavier, white, opaque, unglazed paper, 8 ½ by 11 inches. Orders shall not contain the letterhead of counsel in any margin. All motions, pleadings, and orders shall be double spaced, except legal descriptions of real property. All motions pleading, and orders shall be written with type never smaller than pica, and larger type is preferable, especially in briefs.

208.2 Unless otherwise permitted by order of the Court, the movant's brief or memorandum and the respondent's brief or memorandum shall be limited to 25 pages each. Reply briefs or memoranda shall be limited to 5 pages each.

208.3 Legal briefs shall be filed of record in the Clerk's office. Copies of cases cited therein shall NOT be filed, but shall be placed in the Judge's basket along with a copy of the legal brief.

209. ANSWERING AND FILING INTERROGATORIES OR REQUESTS

209.1 Interrogatories propounded under CR 33 and answers thereto, requests for production or inspection under CR 34 and answers thereto, and requests for admissions under CR 36 and answers thereto shall NOT be filed with the Court except as provided in CR 5.06 or upon order of the Court.

209.2 When answering interrogatories or requests for admission, the replying party shall, as a part of his answer, set forth immediately preceding the answer the question or the request made with respect to which such answer is given whether or not the interrogatories or requests are to be filed with the Court.

210. ORDER OF SUBMISSION

210.1 Upon submission of any action to the Court for final Judgment, the parties shall prepare and present to the Court an Order of submission setting forth in particular the issue or issues on which the action is submitted.

210.2 An action shall be submitted only upon the entry of an order of submission. The order of submission, along with the record, shall be placed in the appropriate order/judgments basket in the Clerk's Office.

210.3 No further pleading, proof or briefs, unless ordered or allowed by the Court for good cause shown, shall be filed after the entry of the order of submission.

210.4 The Court may, but need not, pass upon any such action before such order of submission.

210.5 The conclusion date of a trial or hearing at which a commissioner or hearing officer presided shall be that date when an order of submission is entered by such commissioner or hearing officer.

210.6 In accordance with FCRPP 4(3) and KRS 454.350, the Court or Commissioner shall file an opinion or report within ninety (90) days of the entry of the order of submission.

RULE 3. ADOPTIONS / TERMINATION OF PARENTAL RIGHTS

There are currently no local rules related to Adoptions and Termination of Parental Rights in the 34th Judicial Circuit. For uniform Family Court Rules of Procedure and Practice (FCRPP) on Adoptions and Terminations of Parental Rights see FCRPP 32 through 36.

RULE 4. TWENTY-FOUR HOUR ACCESSIBILITY TO PROTECTIVE ORDERS AND LOCAL JOINT JURISDICTION PROTOCOL

The Twenty-Four Hour Accessibility to Protective Orders and Local Joint Jurisdiction Protocol is attached hereto as Appendix A and is incorporated herein as if copied in full.

RULE 5. PATERNITY

There are currently no local rules related to Paternity. This section is reserved for future use. For uniform Family Court Rules of Procedure and Practice on Paternity, see FCRPP 14 and 15.

RULE 6. DEPENDENCY, NEGLECT AND ABUSE

There are currently no local rules related to Dependency, Neglect and Abuse. This section is reserved for future use. For uniform Family Court Rules of Procedure and Practice on Dependency, Neglect and Abuse, see FCRPP 16 through 31.

RULE 7. DOMESTIC RELATIONS PRACTICE

701. PRACTICE AND PROCEDURE BEFORE THE DOMESTIC RELATIONS COMMISSIONER (D.R.C.)

501.1 The practice and procedure before the D.R.C. shall comply with FCRPP 4 and shall also include the following local rules:

A. Once an order has been entered referring a case to the D.R.C., all motions for Temporary Orders (child custody, child support, maintenance, etc.) shall be heard by the D.R.C. Thereafter, it shall be within the authority of the D.R.C. to make recommendations to the Circuit Judge.

B. All motions seeking injunctive relief, contempt proceedings and any other proceedings specifically designated by statute to be so heard will continue to be heard exclusively by the Circuit Judge.

C. All decrees, rules and all orders entered upon motions to modify or terminate decrees, restraining orders, injunctions, contempt orders and temporary orders entered upon pendente lite motions shall be signed by the Circuit Judge.

D. All routine Orders setting contested trial dates, contested hearing dates or affecting purely administrative matters shall be signed by the D.R.C.

E. If agreed upon by counsel for both parties, an agreed order referring a case to the D.R.C. shall be submitted to the Circuit Judge for approval. If not agreed, the motion must be placed upon the motion docket with proper notice given to all parties.

F. Uncontested domestic relations proceedings may be submitted to the D.R.C. upon expiration of any applicable statutory time period, on motion to the Circuit Court, which may then assign the matter to the D.R.C. for final hearing. Distribution for such orders shall include the D.R.C. Upon entry of the order assigning the matter to the D.R.C., counsel should contact the D.R.C.'s office staff to schedule a hearing time. A scheduling order will then be issued by the D.R.C. Alternatively, uncontested domestic cases may be submitted to the Court upon depositions. Counsel should be prepared to tender proposed Findings of Fact, Conclusions of Law and Decree to the Commissioner at the time of the hearing, or to the Court at the time of submission.

G. Contested domestic relations cases that are referred to the D.R.C. shall be orally heard by the D.R.C. All proceedings before the D.R.C. shall be recorded by audio or video and a recording log shall be kept in compliance with FCRPP 4(3).

H. Either party may move the Circuit Court, after the expiration of any statutory time period, to refer the matter to the D.R.C. for final trial. Distribution on all such orders should include the D.R.C. Adjudication of all contested domestic relations proceedings shall be tried by bench trial before the D.R.C. Once the final trial is scheduled, a continuance may be granted only for good cause shown. Following the scheduling conference, the D.R.C. shall then issue a trial order assigning the date, time and place for the final trial.

I. Each party must file a Preliminary Verified Disclosure Statement (AOC-238) and a Final Verified Disclosure Statement (AOC-239) in compliance with FCRPP 2(3) and FCRPP 3(3).

J. At the conclusion of the final trial the case shall stand submitted to the D.R.C. who shall issue a recommendation of Findings of Fact, Conclusions of Law and Decree within sixty (60) days absent good cause shown. The recommendation shall contain the following

notation along the left-hand margin:

Recommended:

DOMESTIC RELATIONS COMMISSIONER DATE

K. The final report of the D.R.C. shall be filed with the Office of the Circuit Court Clerk and shall be served by the Commissioner upon counsel for each of the parties. Pursuant to FCRPP 4(4), within ten (10) days after being served with notice of the filing of the report, any party may serve written objections thereto upon the other parties. Application to the Court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in CR 6.04. The Court, after receiving the D.R.C.'s report, may adopt the report, or may modify it, or may reject it in whole or in part or may receive further evidence, or may recommit it for further hearing.

L. If no exceptions are filed with the Court within the time allowed, then the parties shall prepare an Order approving and incorporating the proposed Findings of Fact, Conclusions of Law and Decree for execution by the Circuit Court and provide thereon and appropriate opportunity for the D.R.C. to execute approval. If exceptions have been filed subsequent to the ultimate recommendation of the D.R.C., then the Orders relevant thereto shall be tendered directly to the Circuit Court.

M. Parenting classes may be ordered on recommendation of the D.R.C and pursuant to FCRPP 6(4). If parenting classes are ordered, a fee of no more than \$5.00 may be required, unless a party is unable to pay.

N. Post-judgment motions shall be initially scheduled for hearing by the Circuit Judge. Such matters may be assigned to the D.R.C. for hearing by the Circuit Judge in his discretion, and on a case-by-case basis.

O. Final trials to be heard by the D.R.C. shall begin promptly as scheduled and counsel, parties and all witnesses should be present and ready to proceed at the designated time. Should counsel for the parties wish to obtain the services of a court reporter for the purpose of making a record of the final trial, they may do so at their own expense.

P. All child support payments shall be paid as required pursuant to FCRPP 9.

702. COMMISSIONER'S FEES AND HEARING SCHEDULE

702.1 Hearings before the D.R.C. are scheduled by the D.R.C.'s office staff.

702.2 The D.R.C.'s trial order shall include a projected fee assessment. D.R.C. fees are to be paid to the Circuit Court Clerk pursuant to FCRPP 4(6). The D.R.C., in the final report, may include a recommendation that one party reimburse the other for all or part of the fee.

702.3 Any objection to the D.R.C.'s trial fee as assessed must be timely made by motion and notice of hearing before the Circuit Judge prior to the commencement of final trial. A failure to object to the fee as assessed shall be deemed as a waiver of any such objection unless the final fee assessment should exceed that projected by the Commissioner's trial order.

702.4 All cases in which one or both of the parties are proceeding *informa pauperis* should be denoted as such in the style of the case.

703. MODEL TIME-SHARING/VISITATION SCHEDULE AND RULES FOR VISITATION

The schedule attached as Appendix B is suggested as a guideline for the parents and the Courts in establishing time-sharing/visitation schedules. Further, recommended parenting guidelines for visitation are attached as Appendix C. Each case will present unique facts or circumstances which shall be considered by the Court in establishing a time-sharing/visitation schedule and the final schedule established by the court or agreed to by the parents may or may not be what these guidelines suggest.

RULE 8. MISCELLANEOUS RULES RELATING TO FAMILY LAW PRACTICE

There are currently no miscellaneous rules. This section is reserved for future use.

RULE 9. GENERAL CIVIL RULES (INCLUDING FAMILY LAW CASES)

901. PROCEDURE ON RULES FOR CONTEMPT

701.1 To obtain a show cause order in proceedings for contempt, a party should file a motion supported by an affidavit showing the party is entitled to the Order.

701.2 An order may be issued *ex parte* which shall not come on for hearing sooner than five (5) days from the date it is served unless otherwise ordered by the Court.

701.3 No order shall come on for hearing unless it has been served on the person named in the order by an officer authorized to serve a summons. The order shall contain a short statement of the grounds for its issuance and the following statement: "IF YOU FAIL TO APPEAR AT THE HEARING A WARRANT FOR YOUR ARREST WILL ISSUE."

902. DISMISSAL OF ACTION FOR FAILURE TO PROSECUTE

When any action has remained on the Civil Docket for one year without any step being taken indicating an intention to prosecute said action, the action may be dismissed for want of prosecution on motion of either party or on the Court's own motion.

903. WARNING ORDER ATTORNEY

703.1 WARNING ORDER ATTORNEY

A. Attorneys may motion to the Court for a fee for serving as Warning Order Attorney in all Whitley County and McCreary County cases. Any Warning Order Attorney (WOA) seeking payment shall prepare a motion for attorney's fees with an attached order which includes a reasonable fee for the services rendered and submit it for the Judge's approval. Motions for compensation shall be accompanied by an affidavit indicating:

- A. The statutory basis for appointment;
- B. The hours of service rendered with a brief description of the services rendered and reasonableness of the fee requested; and
- C. That the action or proceedings have been concluded.

Attorneys shall also be able to recover the costs expended upon proper itemization to the Court. Attorneys shall petition the Court for an award of their fee and costs after such time as the Warning Order Report is submitted.

B. The Warning Order Attorney shall file the required report within fifty (50) day of the appointment pursuant to CR 4.07(1), and failure to do so may be grounds for sanctions by the Court, whether or not the Warning Order Attorney has been paid.

904. RESERVED FOR FUTURE RULES

905. MEDIATION

905.1 CASES FOR MEDIATION

A judge may refer any civil case to mediation except a habeas corpus case or an election contest.

905.2 REFERRAL TO MEDIATION

A. After the initial court appearance, the judge may, by appropriate order, refer a case to mediation by a court approved mediator, with consent of the parties.

B. Any party may move for an order disqualifying a particular mediator for good cause. If the Court rules that a mediator is disqualified, an order shall be entered naming a qualified replacement. Mediators may disqualify themselves or refuse any assignment. The time for mediation shall be tolled during any period in which a motion to disqualify is pending.

C. Referral to mediation shall not operate to stay discovery unless otherwise ordered by the Court or agreed to in writing by the parties.

905.3 MEDIATION CONFERENCES

A. The parties shall, within five (5) days from entry of the order, contact the mediator to schedule a mediation conference. The mediation conference shall be held within thirty (30)

days from entry of the order.

B. The parties shall attend the mediation conference(s). Counsel shall also be present. The conference shall be conducted by the mediator to consider the possibility of settlement, the simplification of the issues, and any other matters which the mediator and the parties determine may aid in the handling or the disposition of the proceedings.

C. The mediator may schedule such sessions as are necessary to complete the process, and mediation shall continue until the parties have reached a settlement, until they are unwilling to proceed further, or until the mediator determines that further efforts would be futile.

D. If a party fails to appear at a duly noticed mediation conference without good cause, the Court upon motion shall impose sanctions, which may include an award of attorney fees and other costs against the party failing to appear.

E. If a party to mediation is a public entity, that party shall be deemed to appear at a mediation conference by the physical presence of a representative with full authority to negotiate on behalf of the entity and to recommend settlement to the appropriate decision-making body of the entity. In all other cases, unless stipulated by the parties, a party is deemed to appear at a mediation conference if the following persons are physically present:

i. The party or a representative other than the party's counsel of record having full authority to settle without further consultation; and

ii. A representative of the insurance carrier for any insured party who is not such a carrier's outside counsel and who has full authority to settle without further consultation.

F. The mediator may request that the parties bring documents or witnesses, including expert witnesses, to the sessions, but has no authority to order such production.

905.4 CONFIDENTIALITY

A. Except as otherwise provided by this rule or ordered by the Court for good cause shown, all mediation documents and mediation communications are confidential and shall not be disclosed. They are not subject to disclosure through discovery or any other process, and are not admissible into evidence in any judicial or administrative proceeding.

B. No part of the mediation proceedings shall be considered a public record.

C. There is no confidentiality and no restriction on disclosure under this rule to the extent that:

i. All parties consent in writing to disclosure; or

ii. The mediation communication or mediation document gives the mediator knowledge of or reasonable cause to suspect that a child or a spouse has been abused or a child has been neglected; or

iii. The mediation communications were made in furtherance of the commission of a crime or fraud or as part of a plan to commit a crime or fraud.

D. Nothing in this rule shall be construed so as to permit an individual to obtain immunity from prosecution for criminal conduct.

906. REPORTING TO THE COURT

906.1 The mediator shall notify the Court promptly when a case is not accepted for mediation.

906.2 At any time after a case has been accepted, the mediator may refer it back to the Court for good cause, which shall be in writing.

906.3 If a case is settled prior to or during mediation, an attorney for one of the parties shall prepare and submit to the Court an order reflecting the fact of settlement as in any other case.

906.4 If some but not all of the issues in the case are settled during mediation or if agreements are reached to limit discovery or on any other matter, the parties shall submit a joint statement to the Court enumerating the issues that have been resolved and the issues that remain for trial. This statement shall be submitted within 10 days of the termination of mediation. Unsettled cases shall then be returned to the Court's active docket.

906.5 At the conclusion of cases accepted for mediation, the mediator will report to the Court the fact that the mediation process has ended. If the parties do not reach an agreement as to any matter as a result of mediation, the mediator shall report the lack of an agreement to the Court without comment or recommendation. With the consent of the parties, the mediator's report may also identify any pending motions, outstanding legal issues, discovery process or other action by any party which, if resolved or completed, would facilitate settlement.

907. TRANSCRIPTS

Rules governing use of digital recording are promulgated by the Supreme Court of Kentucky. See Kentucky Rules of Civil Procedure, Rule 98.

908. JUDICIAL SALES

908.1 MASTER COMMISSIONER APPROVAL

All judgments or orders directing the sale of property by the Master Commissioner, directing the disbursement of monies held by the Commissioner, or directing the delivery of a deed must, prior to submission thereof to the Court, be submitted along with the record to the

Commissioner for certification that the same complies with all applicable statutes and rules. The Commissioner shall then deliver the judgment or order to the Court for approval and entry.

908.2 DEPOSIT FOR ADVERTISEMENT AND APPRAISAL

A. When any order is submitted to the Commissioner requiring advertisement or appraisal, the Commissioner may require the party submitting the order to deposit with the Commissioner an amount sufficient to pay the estimated costs of the proposed advertisement and/or appraisal and if required, until such deposit is made, the Commissioner shall not submit the order to the Court nor cause advertisement or appraisal to be made.

B. When more than one sale is set for the same date, the commissioner may advertise all such sales in one advertisement with the required information applicable to each action and sale appearing therein. The total costs of advertising shall be apportioned among each of the various cases to which the advertisement applies.

908.3 ORDERS OF SALE AND/OR DELIVERY OF DEED

Every order or judgment of this Court directing the commissioner to sell property or to execute or deliver a deed shall contain:

A. The legal description of the property including a street address (or if it has no street address, a brief identification of its location and size) and any number(s) assigned to the property/parcel by the tax assessor for purposes of identification and record keeping such as the parcel or property identification number;

B. The name of the party or parties whose interest is being sold or conveyed; and

C. The source of the party's or parties' title.

908.4 TERMS AND CONDITIONS OF SALE

Unless otherwise ordered, all sales conducted by the Whitley Master Commissioner, Deputy Commissioner, or Special Master Commissioner shall be scheduled for twelve (12) o'clock (noon) p. m. (local time) on the front steps of the Whitley County Courthouse. Unless otherwise ordered, all sales conducted by the McCreary Commissioner, Deputy Commissioner, or Special Master Commissioner shall be scheduled for twelve (12) o'clock (noon) p.m. (local time) on the front steps of the McCreary County Courthouse.

A. Before conducting a sale, the Master Commissioner shall advertise in a newspaper meeting the requirements of KRS 424.120, the time, terms, and place of sale, together with a description of the property to be sold pursuant to AP Part IV, Sec. 5(3)(c). Said advertisement shall appear once a week for at least three consecutive weeks next preceding the date of sale.

B. Before conducting a sale, if required by order or statute, the Master Commissioner shall have the property appraised by two intelligent, disinterested housekeepers of Whitley or McCreary County, both of whom are actively engaged in or have had at least one year of experience in the field of real estate and who are not related to any parties to the action. The Appraisers shall be sworn by the Master Commissioner before making such appraisals and they shall return their appraisals in writing to the Master Commissioner who shall file same as a part of the record prior to the sale.

C. The master commissioner shall sell the property in a reasonable time not to exceed 90 days after the date of the order of referral except that property found to be “vacant and abandoned” shall be sold in accordance with KRS 426.205. Upon motion and good cause shown, the court may extend the deadline for a period not to exceed 30 days.

D. Unless otherwise ordered, the property shall be sold to the highest bidder upon the following terms and conditions:

E. At the time of sale, the successful bidder shall either pay cash or make a deposit of 10% of the purchase price with the balance on credit for thirty (30) days. If the purchase price is not paid in full, the successful bidder shall be required to execute a bond at the time of sale with sufficient surety approved by the master commissioner prior to the sale to secure the unpaid balance of the purchase price. Said bond shall bear interest at the rate judgment bears per annum pursuant to KRS 360.040 from the date of sale until paid.

F. The purchaser shall be required to assume and pay all taxes or assessments upon the property for the current tax year and all subsequent years. All taxes or assessments upon the property for prior years, shall be paid from the sale proceeds if properly claimed, in writing and filed of record, by the purchaser prior to the payment of the purchase price.

G. The property shall otherwise be sold free and clear of any right, title, and interest of all parties to the action and all liens and encumbrances thereon, excepting easements and restrictions of record in the Whitley or McCreary County Court Clerk’s Office and such a right of redemption as may exist in favor of the United States of America or the defendant(s).

H. A party who is the successful purchaser of the property may take credit against any judgment in that party's favor against the defendant property owner for the required deposit and purchase price to the extent that the sale price is sufficient to pay such judgment considering the priorities and amounts previously adjudicated in the action.

I. The terms and conditions herein above set out may be adopted by reference to this rule in the order or judgment directing the sale, or shall be restated therein.

908.5 CONFIRMATION OF REPORT OF SALE

The Master Commissioner, after making the sale, shall report any actions to the Court by

filing a Report of Sale and Cost of Sale no later than three business days after the date of sale. Ten (10) days after the filing of the report, if no objections have been filed thereto, and with motions, the sale shall be deemed confirmed and an order confirming the sale (with copies) shall be submitted to the Court. A copy of the order of confirmation shall be served upon the purchaser.

908.6 EXECUTION AND DELIVERY OF DEED

The Master Commissioner shall execute and deliver the deed to the purchaser of the property no later than five business days after the court has confirmed the sale and approved the deed and all costs, fees, and other required amounts due and owing, if any, have been paid by the foreclosing mortgagee or lienholder or the purchase price has been paid in full by the third party purchaser.

908.7 CANCELLATION OF SALE

In the event the property is withdrawn from sale, or if the defendant property owner files for relief in Bankruptcy, the sale shall be canceled and the Commissioner shall give notice of cancellation of the sale.

908.8 FEES OF THE COMMISSIONER

The Commissioner shall be entitled to those fees set forth in Part IV of the Administrative Procedures of the Court of Justice. In the event the property is withdrawn from sale through no fault of the Commissioner, he or she shall receive a fee of not more than fifty (50%) percent of what the sale fee would have been as calculated under AP Part IV, Sec. 8(2)(a) and (b), based upon the appraised value of the property, or \$400, whichever is greater, unless written objection is made thereto. Upon objection, or if there is no appraisal, the Court shall set a reasonable fee which shall be no less than \$400.

908.9 ORDERS OF DISTRIBUTION

A. Orders requiring distribution of funds held by the Commissioner shall set forth all amounts collected, identify the proper recipients(s), and the specific amounts due each under the judgment or order.

B. If disbursements are to be made to taxing authorities, a copy of the pertinent tax bill(s) must be furnished to the Commissioner.

C. If all funds held by the Commissioner are distributed by the order requiring the distribution of funds and there are no further matters for determination by the Court, the order shall state that the matter is final and stricken from the Court's docket.

908.10 APPRAISER'S FEE

In all sales of real estate where an appraisal is required, the fee of each appraiser shall be reasonable as determined by the Commissioner. The fee shall be paid from the proceeds of sale.

908.11 HEARINGS BEFORE THE MASTER COMMISSIONER

A. An attested copy of the order referring the case to the Master Commissioner shall be delivered to the Master Commissioner.

B. The Master Commissioner shall promptly assign a date for pre-hearing conference and give written notice thereof. The Master Commissioner may charge and collect a fee in accordance with Part IV Sections 6 or 18 of the Administrative Procedures of the Court of Justice.

C. Any money paid into Court pursuant to CR 67.01 shall be paid to the Master Commissioner, who is authorized to charge a fee as follows:

i. 3 % of first \$2,000.00;

ii. 2 ½ % of the next \$3,000.00;

iii. 1 ½ % for any amount in excess of \$5,000.00, total fee not to exceed \$5,000.00.

909. REMOVAL OF RECORDS

709.1 No person shall remove any from the Offices of the Whitley or McCreary Circuit/District Clerk's Office.

709.2 No person shall remove any files from the litigation area of the Circuit Courtroom.

910. POST-TRIAL CONTACT WITH JURORS

710.1 No party, attorney, or representative of any party or attorney, shall communicate with a member of a jury without leave of Court.

RULE 8. CRIMINAL PROCEEDINGS

801. ASSIGNMENT OF CRIMINAL CASES

When an indictment is returned by the Grand Jury the Clerk shall enter the appropriate information into the computer system and request the computer to assign the case to a Division. Thereafter, all process, pleadings, motions, orders, and papers filed in the case shall set forth the Division on which the case has been assigned.

802. **CRIMINAL COURT SCHEDULING / MOTION HOUR / PROCEDURES FOR FILING -**

802.1 REGULAR MOTION HOUR SCHEDULE - CRIMINAL.

A. **CRIMINAL MOTION DAYS:**

DIVISION I:

WHITLEY – 11:00 A.M. – FIRST (1st) MONDAY OF EACH MONTH

McCREARY – 11:00 A.M. – FOURTH (4th) MONDAY OF EACH MONTH

DIVISION II:

WHITLEY – 11:00 A.M. – THIRD (3rd) MONDAY OF EACH MONTH

McCREARY- 11:00 A.M. – SECOND (2nd) MONDAY OF EACH MONTH

In the event a motion day falls on an observed holiday, it shall be held on Tuesday immediately following the scheduled Monday motion day.

B. CRIMINAL PRE-TRIAL CONFERENCE DAYS:

DIVISION I:

WHITLEY: AT 9:00 A.M. ON THE 2ND TUESDAY OF EACH CRIMINAL SESSION MONTH, THOSE BEING JANUARY, MARCH, MAY, JULY, SEPTEMBER AND NOVEMBER.

McCREARY COUNTY: AT 9:00 A.M. ON THE 3RD TUESDAY OF EACH CRIMINAL SESSION MONTH, THOSE BEING FEBRUARY, APRIL, JUNE AUGUST, OCTOBER AND DECEMBER.

DIVISION II:

WHITLEY COUNTY: AT 9:00 A.M. ON THE 4TH TUESDAY OF EACH CRIMINAL SESSION MONTH, THOSE BEING JANUARY, MARCH, MAY, JULY, SEPTEMBER AND NOVEMBER.

MCCREARY COUNTY: AT 9:00 A.M. ON THE 1ST TUESDAY OF EACH CRIMINAL SESSION MONTH, THOSE BEING FEBRUARY, APRIL, JUNE, AUGUST, OCTOBER AND DECEMBER.

The attorney appearing for the defendant at arraignment shall be in attendance at the Pretrial conference and shall submit such written motions, which are expected to be offered in the case.

DIVISION I:

WHITLEY – 11:00 A.M. - FIRST (1ST) MONDAY OF EACH MONTH

MCCREARY – 11:00 A.M. - FOURTH (4TH) MONDAY OF EACH MONTH

DIVISION II:

WHITLEY - 11:00 A.M. – THIRD (3RD) MONDAY OF EACH MONTH

MCCREARY – 11:00 A.M. – SECOND (2ND) MONDAY OF EACH MONTH

In the event a motion day falls on an observed holiday, it shall be held on Tuesday immediately following the scheduled Monday motion day.

803. GRAND JURIES

A grand jury shall be impaneled in Whitley and McCreary County two times yearly for a six months term and shall serve for both Divisions. Unless otherwise ordered, the grand jury shall meet on the first (1st) Monday of each month in Whitley County and on the second (2nd) Monday of each month in McCreary County and shall report on the third (3rd) Monday of each month in Whitley County and on the fourth (4th) Monday of each month in McCreary County.

804. CRIMINAL INDICTMENT WARRANTS AND ARRAIGNMENTS

804.1 After an Indictment has been returned by the Grand Jury, an Indictment Warrant shall be issued for a defendant, if the defendant has not been processed through District Court. If the defendant has been processed through District Court, a summons shall be issued for the defendant, but, if the case has been processed through District Court and has been dismissed by a 60 day order, then a warrant shall be issued for the defendant.

804.2 Unless otherwise ordered, all defendants shall be arraigned in open court on the following days:

Division I: First (1st) Monday of each month at 11:00 a.m. in Whitley County and the Fourth (4th) Monday of each month at 11:00 a.m. in McCreary County.

Division II: Third (3rd) Monday of each month at 11:00 a.m. in Whitley County and the Second (2nd) Monday of each month at 11:00 a.m. in McCreary County.

In the event a motion day falls on an observed holiday, it shall be held on Tuesday immediately following the scheduled Monday motion day.

805. WITHDRAWAL OF ATTORNEYS IN CRIMINAL CASES

805.1 An Attorney shall not withdraw from employment after arraignment in a criminal proceeding without permission of the Court. Within twenty (20) days of trial, an attorney of record shall not be permitted to withdraw from a criminal case, in the absence of a compelling reason.

805.2 Retained trial counsel shall secure permission of the Court before withdrawing as counsel for any defendant who seeks to appeal a judgment of conviction. Before permission to withdraw is granted, it shall be the responsibility of retained trial counsel to prepare and file the following:

- A. Notice of appeal pursuant to RCr 12.04;
- B. Motion, affidavit, and order for leave to appeal in forma pauperis, if applicable;
- C. Designation of record on appeal; and,
- D. An order substituting the Office of Public Advocacy as counsel on appeal, if applicable.

805.3 At the time of arraignment, each case shall be assigned for a pretrial conference and/or a trial. Only one Pretrial conference shall be held as a matter of course in criminal cases. Participants in the pre-trial conference shall be the Commonwealth Attorney, the victim and/or complaining witness, the defendant, and defendant's attorney. Pretrial Conferences shall be scheduled on the following dates:

DIVISION I:

Whitley County: at 9:00 a.m. on the 2nd Tuesday of each criminal session month, those being January, March, May, July, September, and November.

McCreary County: at 9:00 a.m. on the 3rd Tuesday of each criminal session month, those being February, April, June, August, October, and December.

DIVISION II:

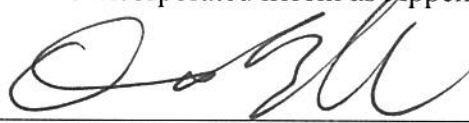
Whitley County: at 9:00 a.m. on the 4th Tuesday of each criminal session month, those being January, March, May, July, September, and November.

McCreary County: at 9:00 a.m. on the 1st Tuesday of each criminal session month, those being February, April, June, August, October and December.

805.3 The attorney appearing for the defendant at arraignment shall be in attendance at the pretrial conference and shall submit such written motions, which are expected to be offered in the case.

806. CLASS D FELONY PRETRIAL DIVERSION PROTOCOL

The Pretrial Diversion Protocol is attached hereto and incorporated herein as Appendix D.



DAN BALLOU
CHIEF CIRCUIT JUDGE
34TH JUDICIAL CIRCUIT
DIVISION I



PAUL WINCHESTER
JUDGE, 34TH JUDICIAL CIRCUIT
DIVISION II

APPENDIX B

VISITATION SCHEDULE:

This schedule contains suggested guidelines for the parents and the Court in establishing time-sharing/visitation schedules. Each case will present unique facts or circumstances which shall be considered by the Court in establishing a time-sharing/visitation schedule and the final schedule established by the court or agreed to by the parents may or may not be what these guidelines suggest.

- (1) Every other weekend from 6:00 p.m. on Friday until 6:00 p.m. on Sunday.
- (2) One evening every other Tuesday from 6:00 p.m. to 8:00 a.m. the next morning, following the weekend that the non-residential parent does not have weekend visitation. The child shall be returned to the other parent at the usual exchange location or taken directly to school, if school is in session.
- (3) Summer: Four weeks, not to run consecutively.
- (4) Child's Birthday: One-half of the day with each parent, but if on a school day, the parents will share the remainder of the day until 8:00 p.m.
- (5) Christmas: The non-residential parent shall have visitation beginning at 6:00 p.m. on the day school ends until 12:00 noon on December 25th every even numbered year, and from 12:00 noon on December 25th until 6:00 p.m. the day before school begins after the holidays every odd numbered year. The opposite will apply for the residential parent. This has priority over any other visitation schedule.
- (6) Thanksgivings: The non-residential parent shall have visitation beginning at 6:00 p.m. the day school gets out until 2:00 p.m. Thanksgiving Day every even numbered year and from 2:00 p.m. Thanksgiving Day until 6:00 p.m. the day before school begins after the holiday every odd numbered year. The opposite will apply for the residential parent. This has priority over any other visitation schedule.
- (7) Memorial Day and Labor Day: Whichever parent has the child in their possession for the weekend shall keep the child for that holiday on Monday. If the non-residential parent has the child, the child shall be returned to the other parent at 6:00 p.m. on Monday.
- (8) Spring and Fall Break: The non-residential parent shall have the child during spring and fall breaks every odd year from 6:00 p.m. the day school ends for the break until 6:00 p.m. the day before school begins after the break. The residential parent shall have the child during the entire spring and fall breaks every even year with priority over any other visitation schedule.
- (9) Mother's Day and Father's Day: The child will spend Mother's Day with the mother and

Father's Day with the father each year from 9:00 a.m. until 6:00 p.m. with priority over any other visitation schedule.

- (10) Mother's birthday and Father's birthday: The child will spend each parent's birthday with that parent. This has priority over any other visitation schedule. If the parent's birthday falls on a school day, visitation shall occur from 6:00 p.m. to 8:00 p.m. with the parent having the birthday. On the non-residential parent's birthday, the child shall be returned to the residential parent by 8:00 p.m., if this not a normal visitation weekend or weekday.
- (11) Phone calls: The non-residential parent can call the child on Wednesdays at 6:00 p.m. and on Fridays at 6:00 p.m. when he/she does not have visitation with the child. The residential parent can call the minor child on Fridays at 7:00 p.m. when the child has visitation with the non-residential parent. The child can call either parent at anytime he or she is with the other parent without interference from the parents.
- (12) The parent receiving visitation privileges shall notify the other parent of their intent to not exercise visitation 48 hours in advance of any visitation. Unless notified, the residential parent shall presume the non-residential parent will exercise visitation in a timely manner.
- (13) Child support shall not abate during any visitation period.
- (14) Regarding relocation of the child's residence:
 - A. Pursuant to FCRPP 7(2) on relocation, before a joint custodian seeks to relocate, written notice shall be filed with the court and notice shall be served on the non-relocating joint custodian. Either party may file a motion for change of custody or time-sharing within 20 days of service of the notice if the custodians are not in agreement; or, the parties shall file an agreed order if the time sharing arrangement is modified by the agreement.
 - B. Before a sole custodian seeks to relocate, written notice shall be filed with the court and notice shall be served on the non-custodial parent. If the court ordered visitation is affected by the relocation, the non-custodial parent may file a motion contesting the change in visitation within 20 days of service of the notice.
- (15) The parties may alter or amend this visitation schedule by mutual agreement. Unless agreed to by the parties or otherwise ordered by the Court, this visitation schedule shall be followed by both parents.

APPENDIX C

GUIDELINES FOR VISITATION:

It is typically in the children's best interest that each parent or custodian has frequent, meaningful, and continuing contact with the children. The parties, in exercising parenting time, should be cooperative and should adapt to the circumstances of the children and of both parties. Parenting time should be liberal and flexible.

The parties are expected to fairly and reasonably modify visitation when family necessities, illnesses, or commitments so require. The parties are also expected to communicate these needs to the other and to provide as much advance notice as is possible, given the circumstances.

It is recommended that each parent specifically obey the following Guidelines for Visitation. Each parent is under an affirmative duty to foster the love and affection of the child for the other parent, and neither parent should:

1. Do or say anything that will interfere with the love and affection of the child for the other parent.
2. Allow third parties to do or say anything to or in the presence of the child that will interfere with the love and affection of the child for the other parent.
3. Have the child deliver money or messages from one parent to the other and thus place the child in the middle.
4. Ask the child to keep a secret from the other parent and, in effect, teach the child to lie.
5. Quiz the child about what is going on at the other parent's home and thus turn the child into a spy.
6. Say unkind things about the other parent to the child or in the presence of the child.
7. Try to conduct parental business when exchanging the child for visitation.
8. Make any threat or start arguments with the other parent when exchanging the child for visitation.
9. Ask the child directly or subtly "which of us do you really want to be with," and thus place the burden on the child.
10. Have the child refer to the future stepparent as "mother" or "father".
11. Eavesdrop on or interrupt the child's telephone conversations with the other parent.

APPENDIX D

**CLASS D FELONY PRETRIAL DIVERSION PROTOCOL
FOR THE 34th JUDICIAL CIRCUIT
MCCREARY AND WHITLEY COUNTY, KENTUCKY**

806.1 DEFINITION

Pretrial diversion is the postponement of imposition of sentence upon any person who qualifies for this program, for a period of time not to exceed five (5) years, subject to certain conditions established by the Court.

806.2 PERSONS ELIGIBLE (KRS 533.250)

A. Any person charged with a Class D felony, who has not had a felony conviction in the ten (10) years prior to commission of the current offense, or who has not been on felony probation or parole or released from felony incarceration within the ten (10) years prior to commission of the current offense, shall be eligible for pretrial diversion. (This paragraph includes persons whose current offense involves charges of multiple Class D felonies. It also includes non-Kentucky residents who would still be supervised by the Kentucky Department of Corrections.)

B. The person charged must enter a plea of guilty, or a plea pursuant to North Carolina v. Alford, before becoming eligible for pretrial diversion.

C. Persons ineligible for probation, parole or conditional discharge under KRS 532.045 shall be ineligible for this program.

D. A person convicted of a Class D felony for which early release is disallowed by statute, including KRS 189A.010(8), shall be ineligible for this program.

E. No person shall be eligible for this program more than once in any five (5) year period.

F. No person shall be eligible for pretrial diversion who has committed a sex crime as defined in KRS 17.500. (KRS 533.250).

G. Unless the court waives compliance under KRS 533.251(2), any defendant charged with a Class D felony offense under KRS Chapter 218A and any defendant whose criminal, medical, or mental health record indicates a present need for or benefit from substance abuse must participate in a substance abuse treatment or recovery program pursuant to KRS 533.241, if space is available, as a condition precedent to entry in the pretrial diversion program.

806.3 PROCEDURE

A. After indictment in circuit court, and no later than 30 days before trial, any person eligible for the program may apply to the Circuit Court and the Commonwealth for entry of a pretrial diversion order.

B. In applying for pretrial diversion, counsel for the defendant must state, and the defendant must agree on the record, that in the event diversion is granted, any right to a speedy trial or disposition of the charge against him/her is waived.

C. The Commonwealth shall make a written recommendation to the Court in response to each application. KRS 533.250(6) .

D. Before making a recommendation to the Court, the Commonwealth shall:

i. Have a criminal record check made by telephoning Pretrial Services at AOC (not local pretrial services), at 1-800-928-6381, or faxing the request to (502) 573-1669.

ii. Interview and seek input from the victim and/or victim's family and advise them of the time, date and place the motion will be heard by the Court.

iii. When diversion is recommended, the Commonwealth must make written recommendations to the Court of conditions for the pretrial diversion as well as the appropriate sentence to be imposed if the diversion agreement is unsuccessful. KRS 533.252(3). AOC Form 347, styled Motion for Pretrial Diversion of a Class D Felony, which contains the Commonwealth's recommendation and is signed by the defendant, defense attorney and the Commonwealth's Attorney, shall be used for this purpose. This diversion plan shall be submitted to the Court as part of defendant's plea agreement.

iv. The Commonwealth will be bound by its recommendation. In the event diversion is unsuccessful, the Commonwealth cannot argue for a sentence in excess of the original recommendation, nor can the Court impose a sentence greater than the recommendation without allowing the defendant the opportunity to withdraw the plea.

v. The Court cannot consider diversion without a written, favorable recommendation from the Commonwealth.

vi. The Commonwealth may withhold its recommendation pending completion of a partial presentence investigation.

807. ORDER OF PRETRIAL DIVERSION

807.1 The Court may, in its discretion, order pretrial diversion for eligible petitioners upon terms and conditions it deems appropriate. AOC Form 345, styled Order Granting Pretrial Diversion of a

Class D Felony shall be used for this purpose. When a defendant who has applied for diversion enters his/her guilty plea or plea pursuant to North Carolina v. Alford, the Court shall modify its inquiry to reflect these items on the record:

- A. Is your guilty plea/plea pursuant to Alford in this case part of an agreement you and your attorney have made with the Commonwealth?
- B. In return for your guilty plea/plea pursuant to Alford, the Commonwealth has agreed to recommend a sentence of _____.
- C. The Commonwealth has also recommended your case be diverted on the following conditions: _____
_____.
- D. The Commonwealth has tendered to the Court a diversion agreement. Have you read the diversion agreement? Have you discussed it with counsel? Has your attorney answered any questions you have about the diversion agreement?
- E. Have you signed the diversion agreement?
- F. Did you voluntarily sign the agreement?
- G. Do you understand that if you successfully complete the diversion agreement, the charge(s) against you will be dismissed?
- H. Do you understand that if the Commonwealth alleges you have failed to comply with the terms of the diversion agreement, the Court will schedule a hearing and, upon completion of the hearing, make a finding as to whether you failed to comply with the diversion agreement?
- I. Do you understand that if the Court finds you have violated the diversion agreement, the Court will schedule a sentencing hearing and at that hearing, the Court may sentence you to the penalty recommended by the Commonwealth?

807.2 The Order of Diversion shall include the following:

- A. Restitution, if applicable. (This is mandatory pursuant to KRS 533.254 where victim has suffered monetary damage.)
- B. Whether the diversion shall be supervised or unsupervised. If supervised, a monthly supervision fee of not less than \$10.00 nor more than \$25.00 shall be imposed on the diveree, unless the fee is waived by the court in the case of indigency KRS 533.250(7).
- C. Duration of the diversion.

D. Requirement that defendant obeys all rules and regulations imposed by Probation and Parole.

E. As required by KRS 533.030(1), that the defendant shall not commit any offense during the period of the pretrial diversion. Defendant shall also comply with the directions of the Probation and Parole Officer (and any other provision of KRS 533.030 or any other condition the Court deems appropriate).

F. The Order of Diversion shall also include the following:

- i. Defendant shall remain drug and alcohol free and be subject to random testing.
- ii. Defendant shall possess neither firearm nor any other deadly weapon.

807.3 The duration of the pretrial diversion shall not exceed five (5) years without the agreement of the defendant. Duration of the diversion agreement shall not be less than the time required to make restitution in full.

A. The Court shall advise the parties as to whether it will accept the diversion agreement. If it is accepted, a specific finding shall be made on the record that the defendant entered the plea and entered into the diversion agreement voluntarily, freely, intelligently and understandingly.

B. If the plea agreement and the diversion agreement are rejected, the Court shall notify the parties and advise the defendant he/she has the option of withdrawing the plea and proceeding to trial, OR maintaining the plea with the knowledge the Court will not order diversion but instead will impose a sentence within the penalty range permitted by law.

C. After questioning the defendant on the record, if the Court is uncertain as to whether it will accept the agreement without the benefit of a PSI, a partial PSI shall be requested. If a partial PSI is requested, the Court shall assign the case for a later date, review the partial PSI, and announce the decision either accepting or rejecting the guilty plea and the diversion agreement.

807.4 VOIDING A DIVERSION ORDER (KRS 533.256)

A. The Commonwealth may apply in writing to the Court for a hearing to determine whether the pretrial diversion agreement should be violated. The application must contain notice of the grounds for voiding the agreement. KRS 533.256(1) and 533.050(2). After the hearing, the Court may void a person's participation in pretrial diversion upon a showing of failure to comply with the conditions of diversion or a failure to make satisfactory progress. AOC Form 346, styled Order Voiding Pretrial Diversion Of A Class D Felony, shall be used for this purpose.

B. If an order of pretrial diversion is voided, the prosecutor shall decide whether or not to

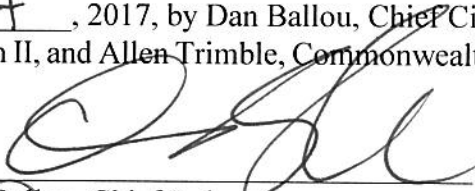
proceed on the guilty plea. KRS 533.256(4). If the prosecutor proceeds on the guilty plea, the defendant shall be sentenced according to law, based on his or her prior plea of guilt/plea pursuant to North Carolina v. Alford. If revocation is ordered, a full PSI shall be ordered and a sentencing hearing shall be scheduled.

C. Under KRS 533.256(2), the same criteria applicable to a probation revocation hearing shall apply to a proceeding to void an order granting diversion. Pursuant to KRE 1101(d)(5), the Rules of Evidence are inapplicable in miscellaneous proceedings such as those revoking probation. A proceeding to determine whether an order granting diversion should be voided also constitutes a miscellaneous proceeding and therefore Rules of Evidence are inapplicable to such hearings.

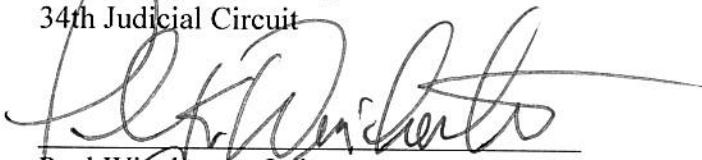
807.5 COMPLETION OF DIVERSION PROGRAM

If the defendant successfully completes the provisions of the pretrial diversion agreement, the charges against the defendant shall be dismissed-diverted and the matter shall be treated as required by KRS 533.258. Defendant should be informed from the beginning that successful completion of a diversion contract does not result in automatic expungement of a criminal charge under KRS 431.076.

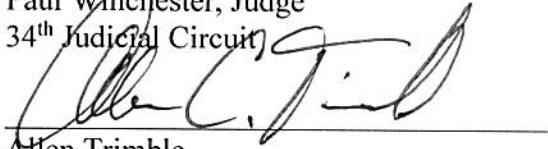
Approved this 1 day of August, 2017, by Dan Ballou, Chief Circuit Judge, Division I, Paul Winchester, Judge, Division II, and Allen Trimble, Commonwealth's Attorney, to be effective immediately.



Dan Ballou, Chief Judge
34th Judicial Circuit



Paul Winchester, Judge
34th Judicial Circuit



Allen Trimble
Commonwealth Attorney